IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ABIGAIL RIVERA,	**:**	**CIVIL ACTION**
Plaintiff	**:**	
	:	
v.	**:**	**NO. 05-4416**
	:	
WAL-MART STORES, INC.,	**:**	
Defendant	**:**	

M E M O R A N D U M

STENGEL, J. **December 20, 2005**

I. INTRODUCTION

On October 31, 2005, this Court entered a memorandum and order dismissing the plaintiff, Rivera's, case for suing the wrong defendant. Rivera allegedly slipped and fell at a Wal-Mart store located in Puerto Rico. Rivera then sued an entity by the name of Wal-Mart Stores, Inc., ("WMSI"). WMSI moved to dismiss claiming Wal-Mart Puerto Rico, Inc., ("WMPRI") is the correct defendant to be named in a negligence case where all of the operative facts occurred in a store owned and operated by WMPRI Rivera now brings this motion to reconsider requesting, for the first time, that she be allowed to amend her original complaint by adding WMPRI as an additional defendant.

II. STANDARD of REVIEW

Motions for reconsideration, as a general rule, are granted sparingly and only in limited circumstances. See Dentsply Int'l. v. Kerr Mfg. Co., 42 F. Supp. 2d 385, 419 (D. Del. 1999). A party bringing a motion seeking to alter or amend an order, pursuant to Fed. R. Civ. P. 59(e), must establish one of three grounds: (i) there is an intervening

change in controlling law, (ii) new evidence has become available, or (iii) there is a need to correct the court's clear error of law or fact or to prevent manifest injustice. Max's Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing North River Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). Furthermore, motions for reconsideration "should not be used to rehash arguments already briefed." Dentsply, 42 F. Supp. 2d at 419. BP Amoco Chem. Co. v. Sun Oil Co., 200 F. Supp. 2d 429, 432 (D. Del. 2002).

III. DISCUSSION

In Rivera's motion to reconsider, no new facts or law are cited and no manifest error of law has been brought to the Court's attention. Rivera is afraid that her case against WMPRI will be time-barred by the statute of limitations unless she is allowed to amend her original complaint.

Generally the court will give leave to amend a complaint freely as justice so requires. Fed. R. Civ. Pro. 15(a). However, the time to request leave to amend is before the Court rules upon the defendant's motion to dismiss, not after. In this case, Rivera responded to the defendant's motion to dismiss without requesting an opportunity to amend the original complaint. At the time Rivera filed her response, she had full notice that she filed against the wrong defendant. Rivera was also fully aware that the statute of limitations may bar an action against Wal-Mart Puerto Rico. Rivera's failure to act in a more timely manner does not create manifest injustice correctable by this Court.

Furthermore, WMSI argues that allowing Rivera to amend her complaint would be futile because, consistent with the court's holding in Brooks v. Bacardi Rum Corp., 943 F. Supp. 559 (E.D. Pa. 1996), this Court likely lacks personal jurisdiction over WMPRI. I agree.

Conversely, Rivera argues she should be allowed to conduct discovery into whether she may "pierce the corporate veil" and hold WMSI, or its third-party claims adjuster, Claims Management, Inc., liable for the actions that took place in Puerto Rico. In support of this contention, Rivera alleges that Claims Management, Inc., made admissions that should hold WMSI liable and she goes on to cite Whayne v. Transportation Management Service, Inc., 252 F. Supp. 573 (E.D. Pa. 1966) for the proposition that she should be able to conduct discovery into the "Instrumentality Theory" enunciated in that case.[1] Rivera further cites an equitable tolling case for the proposition that the Court may not dismiss WMSI from liability based upon the running of the statue of limitations because WMSI purposely mislead the plaintiff.[2] These arguments are, at

[1]Under the "Instrumentality Theory," the "[t]he plaintiff must prove three elements: (1) that the parent controls the subsidiary to such a degree that the subsidiary is a mere instrumentality; (2) that the parent is perpetrating fraud or wrong through its subsidiary (e.g., torts, violation of a statute, or stripping the subsidiary of its assets); and (3) an unjust loss or injury to the claimant, such as insolvency of the subsidiary." Whayne at 577.

[2]Commonwealth v. Transamerica Insurance Company, 462 Pa. 268 (1975) (The commonwealth sought payment on an insurance bond after a commonwealth employee embezzled a large sum of money. The parties negotiated for years while the embezzlement investigation was on-going. After completion of the investigation the employee entered a guilty plea in the related criminal case. The two parties then continued to negotiate and attempted to reach a settlement regarding how much money the Commonwealth was owed from the Insurance company. After years of negotiation, the Commonwealth initiated suit and the Insurance Company moved for Summary Judgment based upon the statute of limitations included in the insurance bond contract. The lower court granted the defendant's motion and the Commonwealth appealed. The case reached the PA Supreme Court and they decided that the Insurance Company's tactics of prolonged negotiations were done specifically to lull the Commonwealth into not filing its suit. The Court stated "Although there was no expressed waiver of the time

best, misplaced. WMSI was dismissed because it is not liable for events that took place in a store owned and operated by WMPRI, a separate corporate entity, or correspondence by a wholly owned subsidiary, Claims Management, Inc. An argument based on equitable tolling, at this point in the litigation, and directed at WMSI is malapropos. As for discovery under the "instrumentality theory," similar to Rivera's request to amend her original complaint, the time to make such a request was before the Court dismissed her case. A motion for reconsideration is not the time to pose slightly different arguments building upon the unsuccessful ones already put forward.[3]

IV. CONCLUSION

The time to make arguments regarding the culpable conduct of either Claims Management, Inc., or WMPRI has passed. If Rivera wished to amend her complaint to name Claims Management, Inc., or WMPRI, she should have done so in her response to WMSI's motion to dismiss. An appropriate order follows.

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limitation or a definitive acknowledgement [sic] of liability by the insured we are satisfied that this record presents a classic example where an insured could reasonably conclude from the course of the negotiations that if there was to be a denial of liability it would have been "exclusively for other reasons."" Commonwealth at 277-78. (Citing reference Omitted) The PA Supreme Court then held that the Statute of Limitations defense put forth by the Insurance company was invalid and remanded the case for further proceedings.) This case may be distinguishable from Commonwealth because Rivera's first contact with the named defendant was when she filed suit. WMSI did not prolong its negotiations or even have regular contact with Rivera. This Court continues to accept the proposition that WMSI, Claims Management, Inc., and WMPRI are three separate entities, and WMSI should not be liable because they did not mislead, or even communicate with, Rivera.

[3]In her response to WMSI's motion to dismiss, Rivera argues that a franchisee/agency relationship existed between WMSI and WMPRI that could provide liability against WMSI. As described in this Court's October 31, 2005 Memorandum and Order, the argument lacked merit.

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ORDER

AND NOW, this day of December, 2005, upon consideration of plaintiff's Motion to Reconsider (Docket # 10), it is hereby **ORDERED** that the motion is **DENIED**. This case shall be marked closed for all purposes by the Clerk of Courts.

BY THE COURT:

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LAWRENCE F. STENGEL, J.